

¹ 5 U.S.C. § 8101 *et seq.*

he was alleging a new occupational disease as he attributed his condition to a change from managerial to clerk duties. It accepted the claim for lumbar sprain and lumbosacral spondylosis and assigned file number xxxxxx804. OWCP paid appellant wage-loss compensation beginning December 27, 2007 and was placed on the periodic rolls effective August 30, 2008.²

In an attempt to determine appellant's capacity to return to work, OWCP referred appellant to Dr. Manhal Ghanma, an orthopedic surgeon, for a second opinion evaluation, on March 16, 2012. In his April 3, 2012 report, Dr. Ghanma found that appellant had no residuals of his November 27, 1992 or April 20, 1993 work injuries, but had residuals from his March 28, 2003 laminectomy and decompression from L3 to S1, including atrophy of the left calf and decreased sensation of the leg and foot. He opined that appellant could work with permanent restrictions. In an April 3, 2012 work restriction evaluation, Dr. Ghanma determined that appellant could sit, walk, and stand for eight hours per day and push, pull, and lift up to 25 pounds for eight hours per day.

On April 20, 2012 OWCP referred appellant for vocational rehabilitation.

Appellant underwent a functional capacity evaluation (FCE) on July 17, 2012 which reflected that he could perform light work constantly sitting, occasionally walking and standing, and frequently lifting and carrying up to 10 pounds.

In an August 22, 2012 work restriction evaluation, Dr. Larry T. Todd, Jr., an osteopath, found that appellant could work eight hours per day within the restrictions of the FCE. Also on August 22, 2012 Dr. Emily J. Yu, a Board-certified physiatrist, reviewed the FCE and determined that appellant could perform light work sitting up to 50 minutes and standing up to 15 minutes at a time and lifting and carrying 10 pounds frequently and 20 pounds occasionally.³

Appellant underwent vocational testing on December 3, 2012. The evaluator noted that appellant had obtained an associate's degree in finance in 1981.

On February 27, 2013 Dr. Yu described appellant's injury to his back in the 1990s that was treated with a fusion in 2003 and a lifting injury at work in December 2007 causing pain radiating into the lower extremities.⁴ She further noted that in 2011 he underwent an extension

² OWCP had previously accepted that appellant sustained a disc herniation at L3-4 on November 27, 1992 under file number xxxxxx176 and lumbar strain and a herniated disc at L3-4 and L4-5, under file number xxxxxx415, that he sustained as a result of lifting, bending, and twisting. Appellant underwent a laminectomy at L4-5 on August 16, 1993, a laminectomy and decompression from L3 to S1 on March 28, 2003, and a spinal fusion at L2-3 on August 30, 2011. On August 30, 2011 appellant underwent a laminectomy and fusion at L2-3 that OWCP authorized under file number xxxxxx804.

³ On June 12, 2012 Dr. Yu noted that appellant reported that he could not sit, walk, or stand for long periods or lift over five pounds. She recommended steroid injections.

⁴ Dr. Yu also submitted a progress report dated February 27, 2013.

of his fusion to L2-3. Dr. Yu also noted that appellant had inadequately controlled diabetes. She stated:

“[Appellant] has positive straight leg raising on the left more than right, tenderness in the lumbar and sacroiliac joint region, weakness in the left foot dorsiflexor. It is my medical opinion that his persistent symptoms are directly [the] result of his initial work-related injury, which resulted in the L3-S1 fusion, as well as the subsequent injury in 2007 with a need for extension to the L2-L3 level and persistent symptoms due to that. At this time, it is my medical opinion that he is unable to maintain any gainful employment due to the multitude of his persistent symptoms.”

On June 30, 2013 the rehabilitation counselor reviewed Dr. Yu’s February 27, 2013 report and noted that appellant intended to retire on disability if the Office of Personnel Management (OPM) approved his application.

In a progress report dated July 10, 2013, Dr. Yu disputed appellant’s ability to attend college and to obtain a degree in accounting. She stated, “[He] feels that he is unable to do that as he cannot stand, walk, or sit for any prolonged periods of time. [Appellant] certainly cannot walk around on a campus. He cannot sit for more than 15 minutes at a time for any classes.” Dr. Yu diagnosed status post an April 19, 1993 employment injury and bilateral sacroiliac joint dysfunction. She advised that “attending classes and sitting and walking on campus will significantly exacerbate [his] symptoms.”

A job classification dated July 29, 2013 identified the position of payroll clerk as a sedentary job requiring a specific vocational preparation of three to six months. The rehabilitation counselor advised that appellant could meet the vocational preparation by obtaining a bookkeeping certificate. She noted that he had an associate’s degree in finance from 30 years earlier but that it was outdated because he did not understand computer software packages. The rehabilitation counselor determined that the position was available in sufficient numbers in his geographical area.

On August 15, 2013 an OWCP rehabilitation specialist approved a plan for appellant to attend a training program for four months to prepare to work as either a payroll clerk or bookkeeper.

On August 21, 2013 the rehabilitation counselor reported that appellant agreed to obtain a bookkeeping certificate because he could take the classes on the computer.

On October 9, 2013 Dr. Yu noted that appellant began attending classes in August 2013 but had not returned to class since the first week due to increased pain. She reported that appellant complained of depression.⁵

⁵ In a disability certificate dated July 10, 2013, received by OWCP on August 26, 2013, Dr. Yu advised that appellant could not stand over five minutes or climb stairs.

In a report dated October 26, 2013, the rehabilitation counselor related that appellant was having difficulty focusing on his course work due to stress. In a telephone call dated October 18, 2013, the rehabilitation counselor related:

“[Appellant] stated that he is not able to concentrate on his classes and essentially has [not] attended classes in the past [two to three] weeks. He noted that he was doing ok at the beginning of the term but has [not] turned in any homework assignments or taken any quizzes or examinations in the past [three] weeks. [Appellant] feels that he is probably failing his courses at this point.”

The rehabilitation counselor noted that appellant had received treatment at the emergency room for psychological issues. She advised him to submit medical evidence from his provider addressing his inability to participate in the vocational rehabilitation program.

On October 31, 2013 Dr. Matthew D. Cook, who specializes in family medicine, indicated that appellant was unable to “do work rehab[ilitation] or on line classes due to depression [and] anxiety.”

By letter dated November 19, 2013, OWCP informed appellant that the medical evidence from Dr. Cook was insufficient to show that he was unable to participate in vocational rehabilitation as he was not a psychiatrist and had not provided rationale for his opinion. OWCP advised appellant of the provisions of section 8113(b) of FECA and instructed him to contact OWCP to make arrangements to continue with the training program or provide reasons for his refusal with any supporting evidence within “the allotted period.”

On December 11, 2013 the rehabilitation counselor reported that appellant had expressed concern, in a telephone call on November 26, 2013, about the November 21, 2013 letter from OWCP suggesting that he had refused to participate in vocational rehabilitation and instructing him to return to his training program. She told appellant that, as he had not participated, OWCP would only approve “a job search program for [him] to pursue a direct placement program.” Appellant advised that OWCP had instructed him to return to the original training program. The rehabilitation counselor indicated that she had contacted an OWCP rehabilitation specialist.

In an e-mail dated December 23, 2013 to OWCP’s claims examiner, an OWCP rehabilitation specialist indicated that she had read the proposed sanction letter advising appellant to resume training.⁶ She noted that appellant had failed the training and that he had attributed his failure to stress. The rehabilitation specialist disagreed that appellant could resume coursework and asked if appellant would be rated on the position that he could have performed if he completed the training or jobs he could currently perform. In response, an OWCP claims examiner advised that he could not rate appellant on a position for which he had failed his training.”

⁶ In a report dated November 20, 2013, a rehabilitation counselor had reviewed appellant’s contention that his physician found that he was not mentally stable enough to participate in vocational rehabilitation. She advised that appellant needed to submit a detailed medical report. Appellant noted that he was on a suicide watch in the hospital in October 2013 but did not want to give OWCP this information because it was private. He related that he could not be reimbursed for treatment from a mental health professional under his insurance.

In a December 23, 2013 reply, OWCP rehabilitation specialist advised that appellant should have notified his rehabilitation counselor earlier that he was having difficulty with training, but instead quit without notice. She found that it was “reasonable to assume that had he maintained a ‘C’ average OR had he NOT quit attending training he would have succeeded....” (Emphasis in original). The vocational rehabilitation specialist opined that appellant should be rated based on the job he would have received had he completed training.

In a report dated January 1, 2014, the rehabilitation counselor informed appellant that OWCP might tell him to reenroll in training, begin a job search within his capabilities, or issue a loss of wage-earning capacity determination based on either the goal of the training program or an entry-level position.

In a vocational rehabilitation report dated January 6, 2014, the rehabilitation counselor noted that on January 3, 2014 appellant suggested that he could sign up for courses in pursuit of his bookkeeping certificate in the spring. She advised appellant that this did “not appear to be an option at this point.”

On January 8, 2014 the OWCP rehabilitation specialist closed the rehabilitation file. She determined that appellant had enrolled in training classes but had not advised the rehabilitation counselor that he was failing the class or that he had quit. The rehabilitation specialist noted that appellant had attributed his lack of participation to stress but had not submitted sufficient supporting medical evidence. She cited the procedure manual that noncooperation with vocational rehabilitation included failing to maintain a “C” average, failing to go to class, and failing to apply sufficient effort. The rehabilitation specialist determined that it was “reasonable to assume had [appellant] continued his training courses and sought [additional] assistance from his [rehabilitation counselor] he would have successfully completed training to the most logical conclusion.” She found that the positions of payroll clerk and bookkeeper were medically and vocationally suitable and performed in sufficient numbers in his geographical area at weekly wages of \$480.00 for payroll clerk and \$440.00 for bookkeeper.

On January 13, 2014 Dr. Yu diagnosed low back pain after a fusion, chronic radiculopathy, and bilateral sacroiliac joint dysfunction. On examination, she found a negative straight leg raise with full strength and sensation. Dr. Yu stated, “[Appellant] is unable to work due to the severity of his pain. He is unable to proceed with vocational rehabilitation due to the severity of his pain.” Dr. Yu also noted that appellant was “battling severe depression.”

In a report dated January 15, 2014, the rehabilitation counselor noted asking appellant about his job goals for direct placement and appellant advised that he did not feel he could currently work.

On January 15, 2014 OWCP referred appellant to Dr. Ghanma for an updated second opinion evaluation. In a report dated February 18, 2014, Dr. Ghanma discussed his history of work injuries and resulting surgeries. He reviewed the positions of bookkeeper and payroll clerk and found that appellant was medically capable of performing the duties of both positions as they were sedentary in nature.

In a report dated March 17, 2014, Dr. Yu diagnosed bilateral sacroiliac joint dysfunction due to a change in mechanics resulting from appellant's employment-related L2 through S1 fusion. She found that he was totally disabled from employment.

Appellant elected to receive retirement benefits from OPM in lieu of workers' compensation benefits effective December 1, 2014.

On July 1, 2014 OWCP requested that Dr. Yu review Dr. Ghanma's report and advise whether appellant could perform the positions of bookkeeper and payroll clerk.

The rehabilitation counselor indicated that the position of payroll clerk was sedentary and reasonably available within appellant's geographical area at entry-level wages of \$472.00 per week. She noted that OWCP had approved a year-long training program for him to "develop modern day skills for record keeping activities such as payroll, accounts receivable and accounts payable, records preparation and other types of financial record-keeping activities."

On November 10, 2014 OWCP advised appellant of its proposed reduction of his compensation as he had the capacity to earn wages as a payroll clerk at the rate of \$472.00 per week.

On December 4, 2014 appellant challenged the proposed reduction of his compensation. He argued that the second opinion physician was a "quack" and that Dr. Yu found that he was unable to work. Appellant disputed that he failed to notify his rehabilitation counselor of his situation. He maintained that Dr. Ghanma did not have all of his medical records to review.

By decision dated December 23, 2014, OWCP reduced appellant's compensation benefits effective that date based on its finding that he had the physical and vocational capacity to work as a payroll clerk earning wages of \$472.00 per week. It noted that it closed his vocational rehabilitation because he stopped going to classes without promptly informing the rehabilitation counselor. OWCP concluded that if appellant had completed rehabilitation he could have worked as a payroll clerk. It applied the formula set forth in *Albert C. Shadrick*⁷ to determine his wage-earning capacity.

On appeal appellant argues that his physicians found that he was unable to work and that he notified the rehabilitation counselor that he was failing his classes.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁸ Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-

⁷ 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

⁸ See *T.O.*, 58 ECAB 377 (2007).

earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age, and prior experience.¹⁰ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*¹¹ will result in the percentage of the employee's loss of wage-earning capacity.

Section 8113(b) of FECA further provides, "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104"¹² OWCP, after finding that in the absence of such failure the wage-earning capacity of the individual would likely have increased substantially, "may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been [her] wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the directions of OWCP.¹³ OWCP procedures require that prior to reduction of compensation a claimant be notified of the provisions of section 8113(b) and provided an opportunity to either resume participation in vocational rehabilitation or provide reasons for not continuing participation.¹⁴ Under section 8104 of FECA, the employee's failure to willingly cooperate with vocational rehabilitation may form the basis for terminating the rehabilitation program and the reduction of monetary compensation.¹⁵ OWCP's implementing regulations indicate that the

⁹ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

¹⁰ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

¹¹ *See supra* note 6.

¹² Section 8104(a) of FECA pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services."

¹³ 5 U.S.C. § 8113(b).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.17 (February 2011).

¹⁵ *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the Board found that OWCP properly reduced the claimant's wage-loss compensation benefits as he failed to cooperate with the early and necessary stages of developing an appropriate training program).

reduction remains in effect “until such time as the employee acts in good faith to comply with the directions of [OWCP].”¹⁶

Regarding the failure to cooperate with the training stage of vocational rehabilitation, OWCP’s procedure state:

“Refusing or Impeding Training: Specific instances of non-cooperation during this phase of vocational rehabilitation include: failure to attend classes; failure to apply appropriate effort to succeed in such classes; failure to maintain a ‘C’ average; and failure to undergo training after a training program has been approved. If the claimant refuses or impedes rehabilitation training, the CE [claims examiner] shall notify the injured worker, in writing, of the provisions of 5 U.S.C. § 8113(b) and direct the injured worker to apply for, participate in, or resume participation in the training program. The letter should advise the injured worker to comply or provide a written explanation of [his] failure to comply within 30 days, or the provisions of 5 U.S.C. § 8113(b) will be applied and benefits will be reduced based on the jobs targeted in the approved training plan.”¹⁷

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain and lumbosacral spondylosis under file number xxxxxx804, a disc herniation at L3-4 under file number xxxxxx176, and lumbar strain and a herniated disc at L3-4 and L4-5 under file number xxxxxx415. He underwent a laminectomy at L4-5 on August 16, 1993, a laminectomy and decompression from L3 to S1 on March 28, 2003, a spinal fusion at L2-3 on August 30, 2011, and a laminectomy and fusion at L2-3 on August 20, 2011.

OWCP paid appellant compensation for total disability under file number xxxxxx804 beginning December 21, 2007. On April 3, 2012 Dr. Ghanma, an OWCP referral physician, found that he could work with restrictions of pushing, pulling, and lifting up to 25 pounds for eight hours per day. Based on his report, OWCP referred appellant for vocational rehabilitation.

OWCP properly found that the medical evidence established that appellant had the capacity to perform the duties of a payroll clerk. The position is classified as sedentary and requires occasional lifting up to 10 pounds; thus, it is within the restrictions set forth by Dr. Ghanma.

In a report dated February 27, 2013, Dr. Yu advised that appellant was unable to work due to his employment injury. She did not, however, specifically address the relevant issue of whether he could participate in vocational rehabilitation. On July 30, 2013 Dr. Yu opined that appellant’s symptoms would be aggravated by attending classes and walking around the campus.

¹⁶ 20 C.F.R. § 10.519.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(c) (February 2011).

Her restrictions, however, were prophylactic in nature, and the possibility of a future injury does not form the basis for the payment of compensation under FECA.¹⁸

In a report dated January 13, 2014, Dr. Yu diagnosed low back pain subsequent to a fusion, chronic radiculopathy, and bilateral sacroiliac joint dysfunction. She found that appellant was totally disabled from work and unable to participate in vocational rehabilitation due to pain. On March 17, 2014 Dr. Yu diagnosed sacroiliac joint dysfunction due to mechanical dysfunction related to his fusion at L2 through S1 and opined that he was unable to perform employment duties. She did not, however, provide rationale for his finding that he was unable to participate in employment duties. Further, OWCP did not accept sacroiliac joint dysfunction as work related. Where appellant claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.¹⁹ Dr. Yu, while attributing the bilateral sacroiliac joint dysfunction to a change in mechanics resulting from a fusion, did not fully explain the reason for the development of the condition or why it resulted in total disability. A physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.²⁰

On January 15, 2014 OWCP again referred appellant to Dr. Ghanma. On February 18, 2014 Dr. Ghanma reviewed the position of payroll clerk and determined that it was within his physical capacity. In July 2014 OWCP requested that Dr. Yu review and comment on Dr. Ghanma's February 18, 2014 report, but she did not respond to the request. The Board finds that OWCP properly determined that appellant had the physical capacity to perform the position of payroll clerk based on the opinion of Dr. Ghanma. While appellant contended that he was unable to participate in vocational rehabilitation due to depression, he submitted only an October 31, 2013 report from Dr. Cook, a family physician, who found that he was unable to participate in vocational rehabilitation as a result of depression and anxiety. As Dr. Cook is not a psychiatrist or psychologist, his opinion is of reduced probative value as he is not a specialist in the appropriate field.²¹

The Board finds, however, that OWCP did not meet its burden of proof to reduce appellant's monetary compensation. The rehabilitation counselor found that appellant met the physical requirements for the position of payroll clerk, but that he required additional training before he had the vocational capacity to perform the position. Consequently, appellant began attending school to obtain certification as a bookkeeper. Appellant stopped doing his coursework and did not receive his certificate. OWCP considered this failure as a lack of cooperation with vocational rehabilitation and used this as a basis to reduce compensation under section 8113 of FECA for failure to cooperate with vocational rehabilitation.

¹⁸ *Andy J. Paloukos*, 54 ECAB 712 (2003).

¹⁹ *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

²⁰ *Jean Culliton*, 337 ECAB 728 (1996).

²¹ *See P.S.*, Docket No. 07-2020 (issued March 12, 2008); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

Section 8113(b) of FECA provides that, if a claimant without good cause fails to undergo vocational rehabilitation when instructed by OWCP, it may reduce his wage-earning capacity in accordance with what would have been his earning capacity without the failure to participate. When a claimant fails to proceed with an approved training program, OWCP must direct him to comply with the program and explain that if he fails to comply it will apply the provisions of section 8113(b) and reduce his monetary compensation.²² By letter dated November 19, 2013, OWCP advised appellant of the provisions of section 8113(b) and instructed him to make arrangements to continue his training program or submit reasons for his refusal to participate in vocational rehabilitation “within the allotted period.” OWCP’s procedures provide that a warning letter advising a claimant of the penalties for failing to cooperate with vocational rehabilitation indicate that he must be provided with a letter allowing 30 days for a written explanation for his failure to cooperate.²³ In its November 19, 2013 letter, OWCP did not specify a time in which appellant needed to respond to its letter, and thus it did not comply with its procedural requirements.

The Board finds that OWCP failed to properly reduce wage-loss compensation based on appellant’s failure to cooperate with vocational rehabilitation.

CONCLUSION

The Board finds that OWCP improperly reduced appellant’s compensation based on appellant’s failure to cooperate with vocational rehabilitation under section 8113.

²² *Id.* at Chapter 2.813.17(c) (February 2011).

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 5, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board